IN THE

Supreme Court of the United States

October Term, 1950.

No. 473.

CHARLES F. BRANNAN, Secretary of Agriculture,
Petitioner

v.

ROBERT D. ELDER AND GREENE CHANDLER FURMAN,
Respondents

No. 474.

ROBERT D. ELDER AND GREENE CHANDLER FURMAN,
Petitioners

v.

CHARLES F. BRANNAN, Secretary of Agriculture,
Respondent

On Cross-Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

REPLY BRIEF FOR THE VETERANS ELDER AND FURMAN.

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CITATIONS

CASES: *

* In addition to cases cited in the Veterans' Brief for the Petitioners filed March 19, 1951.

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STATEMENT.

The petitioner-respondent Secretary of Agriculture will be referred to as "the Secretary"; Elder and Furman as "the veterans" or "the petitioners".

On March 19, 1951, the veterans filed their consolidated Brief in both No. 473 and 474, dealing with the entire range

of both cases as "Petitioners", in deference to the practical purpose of Rule 28(1) of this Court. The consolidated "Statement" at pp. 5-9 of such "*Brief for the Petitioners*" comprises all facts material to the consideration of the questions presented in both No. 473 and No. 474.

ARGUMENT.

I.

The Veterans' Right to Preference in Reinstatement Under § 2 of the Act of 1944 Was Violated October 27, 1947, And Has Since Been Wrongfully Denied. (No. 473)

Summary of argument.

Section 15 is inapplicable and irrelevant to the issues in No. 473. The provisions of Sections 7 and 8, which are incorporated by reference in Section 15, prescribe an integral procedure applicable and available only with respect to positions in the competitive service subject to the Civil Service Act and Rules, and inapplicable and unavailable with respect to the "unclassified" and "excepted" Attorney positions which are the subject of the instant suits. Such Attorney positions were "excepted" from the competitive civil service and from the operation of the Civil Service Act and Rules since May 1, 1947, by Schedule A of the new Civil Service Rules [86.4, 12 F. R. 2839].

The regulations for reductions-in-force under Section 12 are admittedly and clearly inapplicable and irrelevant to the issues in No. 473. (No. 473, Secy. Br. 23; Veterans' "Brief for the Petitioners", 41-42). The Court of Appeals expressly held that such regulations for reductions-in-force under Section 12 were not violated (R. 91-92) and held that only the rights to preference in reinstatement under Section 2 were violated (R. 93-95). Such regulations are thus no part of the basis for the judgment of the Court of Appeals attacked by the Secretary in No. 473.

The Secretary's Petition for a writ of certiorari in No. 473 presents the sole question whether Section 15, rather

than the regulations for reductions-in-force under Section 12, governs the "reemployment rights of veterans properly separated from their positions in federal service" (No. 473, Secy. Petition, p. 2). Since each of these alternatives is unavailable, inapplicable, and irrelevant to the issues in No. 473, the sole question presented by the Secretary is irrelevant and moot. Since no other question is presented by the Secretary's Petition for a writ of certiorari in No. 473, the writ of certiorari in No. 473 should be dismissed. Rule 38(2), p. 30, of the Revised Rules of the Supreme Court of the United States provides *inter alia*:

> "* * * Only the questions specifically brought forward by the petition for the writ of certiorari will be considered. * * *"

Section 2 embodies the general policy and purpose of the Veterans' Preference Act of 1944. Section 2 itself designates, creates, grants, prescribes, and defines the initial scope and effect of five specific preferences which Congress therein commands "shall be given" in the unclassified civil service, as well as in the classified civil service, and in the comprehensive scope throughout the Government therein prescribed and defined, to four primary classes of veterans. In Section 2 this grant is in no way qualified by or conditioned upon tenure of employment, length of service, or efficiency ratings.

Among the five preferences so granted is the third specific preference in *reinstatement*.

In each of several later sections of the Act, e.g. 5, 7, 8, 12, 13, and 16, Congress has further defined, extended, or limited the scope and effect to be given one or more of the specific preferences granted under Section 2. For example, in Section 12 Congress limited the preference in retention to a sub-class of veterans' preference employees whose efficiency ratings are "good" or better. And in Section 5 Congress extended, rather than limited, the scope and effect of the specific preferences in *reinstatement*, retention, and appointment, so that the waivers as to age, height,

and weight therein described may be available to veterans entitled to such specific preferences.

The initial scope or effect of the specific preference in *reinstatement* under Section 2 is not elsewhere limited or further defined, except in Section 5 as above noted.

Any additional provision or exception from the general policy embodied in Section 2 is subject to the elementary rule that exceptions from a general policy which a law embodies should be strictly construed, that is, should be interpreted so as not to destroy the remedial processes intended to be accomplished by the enactment. *Spokane & Island R. Co.* v. *United States*, 241 U. S. 344, 350; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311-312.

In enacting Section 2 Congress adopted the known and settled construction of its key provisions by the Courts of the State of New York, a construction which confirms the intention and purpose expressed by the plain language of Section 2 and makes the natural import and meaning thereof effective. *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 36; *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295, 307; and see *Stutzbach* v. *Coler* (1900) 62 App. Div. 219, 70 N. Y. S. 901, 904-907, affd. 168 N. Y. 416, 419-421; and other cases cited and discussed at pp. 33-37 of the veterans' "Brief for the Petitioners".

The reports of committees of the Congress, remarks of sponsors, and other matters incidental to legislative history, cannot be resorted to for the purpose of construing Section 2 of the Act of 1944 or any other statute contrary to its plain language and meaning and to the natural import of its terms. *Ex Parte Collett*, 337 U. S. 55, 61; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83. The rule is that expression by the legislature of an erroneous opinion about the law does not alter it. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 163.

Counsel for the Secretary contend that certain regulations of the Civil Service Commission deal with "reinstate-

ment" as "a type of reemployment available only to persons with competitive status", or as confining any right to "reinstatement" to employees with competitive status.

Section 2 expressly prescribes that preference in reinstatement shall be given to veterans in the *unclassified* civil service as well as in the classified civil service. Such regulations fail to carry out the will of Congress as expressed in the statute, operate to create a rule out of harmony with the statute, and are an unauthorized nullity insofar as veterans are concerned. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 143; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610.

The rights of each of these veterans to the specific preference in reinstatement in the position from which he had been removed—Attorney, Grade P-3—were violated by the reinstatement, or reemployment, or employment of non-veterans in such positions on October 27, 1947, *et seq.*, while continuing to exclude the veterans therefrom. Cf. *People ex rel. Shields* v. *Scannell* (1900), 48 App. Div. 69, 73, 62 N. Y. S. 682, 683; *Meenaugh* v. *Dewey, District Attorney* (1939) 17 N. Y. S. 2d 599, 601.

1. Section 15 is inapplicable and irrelevant to these "excepted" positions in the unclassified service. (No. 473)

The Secretary concedes that in Section 2 Congress does "declare a general policy of preference" (No. 473, Br. 13, 12).

But his counsel contend that in Section 15 "Congress carefully delimited the scope of the veterans' reemployment [sic] rights" (No. 473, Br. 11) and that "their rights to be rehired [sic] depended on Section 15, which deals specifically and exclusively with the reemployment [sic] preference" (No. 473, Br. 21, 2).

Throughout their No. 473 Brief counsel persist in this spurious assumption that the specific preference in reinstatement designated and prescribed by Section 2 is in-

tended by Congress to mean the same thing as the preference in reemployment, and *vice versa*, and intended to mean the same thing as the term "recertification and reappointment" employed in Section 15. In plain words, of course, Section 15 makes no reference to either reinstatement or reemployment; and neither of these terms is commensurate in meaning, area, or character with "recertification and reappointment." But it is unnecessary to pursue the Secretary's assumption to its extinction in some etymological swamp.

For Section 15 in itself discloses that its provisions do not and cannot affect the rights of either of the two veterans in the instant case with respect to the position of Attorney, Grade P-3, from which each has been removed.

Section 15 provides conditions upon compliance with which a preference eligible "shall then be eligible for recertification and reappointment in the order and according to the procedure as provided for in Section 7 and 8 hereof * * * for every position for which his qualifications have been established."

Section 15 does *not* provide that a veteran "shall then be eligible" for recertification alone, or for reappointment alone, or for recertification and/or reappointment, but that such veteran

> "* * * shall then be eligible for recertification *AND* reappointment *IN THE ORDER* and *according to the procedure* as provided for in Sections 7 and 8 hereof." [Emphasis supplied].

Necessarily, "certification for appointment," or "recertification for reappointment", precedes appointment or reappointment as the case may be, and does not follow appointment or reappointment. Section 8 commences with the determinative provision:

> "Sec. 8. When, *in accordance with civil service laws and rules* a nominating or appointing officer shall request certification of eligibles for appointment pur-

poses, the Civil Service Commission shall certify, from the top of the appropriate register of eligibles, a number of names * * *" [Emphasis supplied]

By virtue of Section 8, therefore, the integral consecutive procedure of Section 15 in "recertification and reappointment" is explicitly confined to definite situations *"in accordance with the civil service laws and rules"*. The specific procedure defined under Section 8 and Section 15 is accordingly made applicable only with respect to situations and positions in the competitive service subject to the civil service laws and rules. Such integral consecutive procedure is accordingly unavailable and inapplicable with respect to any situation or position which is not subject to, or which is "excepted" from, the competitive service and from the operation of the Civil Service Act and Rules.

At this point this Court will doubtless be aware, and take judicial notice from the Civil Service Rules and Regulations cited by both parties herein, that there is no "appropriate register" or even list of Attorney eligibles from which the Civil Service Commission can certify any names whatever—and that there has been no such register or list since May 1, 1947. Since that date any attorney who calls at the Civil Service Commission, and inquires about employment in an Attorney position with the Government, is politely but definitely told that the Civil Service Commission has nothing to do with Attorney positions or with the employment of Attorneys, that there is no examination of any sort, no register of Attorney eligibles, no list of same, and no available information about any agency which may require the services of an Attorney.

This, by the simplest of definitions, is what is meant by an "excepted position".

Counsel for the Secretary have repeatedly insisted [e.g. No. 473, Secy. Br., 19, 21] that the Attorney positions here in question have been expressly excepted from the competitive service and from the Civil Service Act and Rules by the listing under Schedule A of the new Civil Service

Rules effective May 1, 1947 (12 F. R. 2839, § 6.4), which provides:

> "§ 6.4 *Lists of positions excepted from the competitive service*—(a) *Schedule A.* The following positions are those excepted from the competitive service
> • • •
> (ii) Cooks • • •
> (iv) Attorneys.
> (v) Chinese, Japanese, and Hindu interpreters.
> • • •".

These Rules of May 1, 1947, further provide:

> "§ 1.1 *Positions and employees affected by these Rules.* (a) These rules shall apply to all positions in the competitive service. • • • The competitive service shall include all civilian positions in the executive branch of the Government unless specifically excepted therefrom. • • •
>
> (b) Persons occupying such positions shall be considered as being in the competitive service when they have a competitive status. • • • A competitive status shall be acquired by probational appointment through competitive examination, or may be granted by statute, Executive order, or by Civil Service Rules." (12 F. R. 2831, § 1.1).

Accordingly, such integral consecutive procedure for "recertification and reappointment" under Section 15 is *per se* applicable only to positions and employees in the competitive service subject to the Civil Service Act and Rules, and is *per se* inapplicable to positions in the pariah caste of Cooks, Attorneys, Chinese, Japanese, and Hindu interpreters, et al, which have been since May 1, 1947, expressly excepted from the competitive service and Civil Service Act and Rules. §§ 1.1 and 6.4, *supra.*

The attention of the Court is invited at this point to the correlative significance of the above definitions by the Civil Service Rules in connection with an alternative aspect of the Argument under Part IV at page 45 of our previous

brief. By virtue of §§ 1.1 and 6.4 of the Rules, neither a veteran nor a nonveteran employee who is in a position excepted from the competitive service—as Attorney, Grade P-3—is subject to the Civil Service Act and Rules. A nonveteran in such unclassified noncompetitive position, whatever his civil service status or tenure, would thus *not* be subject to the regulations for reductions-in-force under said Civil Service Act and Rules. (§ 20.3, 12 F. R. 2850). Therefore classification in a higher retention subgroup A-2 would not be available to a nonveteran over a veteran in such position. Being expressly excepted and negatived by the Commission under § 6.4 of its Rules, the alleged basis of (1) *"administrative construction,"* and (2) *administrative action*, alike fails in the premises; and the mandatory statutory preference in retention of the veterans' preference employee whose efficiency ratings are "good" or better must be deemed to prevail and be given effect by the Secretary, the Commission, and the District Court.

It is also to be observed that the eligibility for "recertification and reappointment" under Section 15 expressly extends to "every position for which his qualifications have been established."

Under the terms of Section 2, the grant of the specific preference in reinstatement is, by its intrinsic natural import, necessarily limited to *"the position from which he has been removed."* *Collins* v. *United States*, 15 Ct. Cl. 22; *Caminetti* v. *United States*, 242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409-410.

The language of Section 2, as well as of Section 15, 8, and 7, affords no tenable basis for the writing in of a conclusion that Congress intended, in the guise of "recertification and reappointment" under Section 15, to *extend* the preference in *reinstatement* from its intrinsically limited scope and effect in "the position from which he has been removed" to a conflicting and variant scope and effect with respect to "every [other] position for which his qualifications have been established" (Sec. 15, *supra*).

Nor do the plain terms of Sections 2, 7, 8, and 15, construed together, afford any reasonable basis for a determination, that Congress intended to subject the specific preference in "reinstatement" to any of the conditions which it imposed on "recertification and reappointment". *Thompson* v. *United States*, 280 U. S. 420, 442.

Counsel argue that reinstatement is a right limited to persons with competitive status, and for support refer to a Civil Service regulation (5 CFR (1949) Part 7) and the Federal Personnel Manual (p. Z1-245), which counsel say "make use of reinstatement" as "a type of reemployment available only to persons with competitive status." (No. 473, Secy. Br. 19).

The words used by Congress in a statute are presumed to be used in their usual and most ordinary sense, and with the meaning commonly attributed to them. If the language is plain and the meaning clear, the duty of interpretation does not arise and the sole function of the courts is to enforce the statute according to its terms. *Caminetti* v. *United States*, 242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 282 U. S. 399, 409.

The inceptive attention and weight to be given to contemporaneous construction of a statute by administrative officers charged with its execution is a rule of interpretation, but it is by no means an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. However long continued by successive officers, such administrative construction must yield to the positive language of the statutes. *Houghton* v. *Payne*, 194 U. S. 88, 100; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 330, 331; *Brewster* v. *Gage*, 280 U. S. 327, 336.

The Commission's alleged construction of the word "reinstatement", dated 1949, would change in a radical fashion the natural import and most ordinary sense of the word as well as the meaning commonly attributed to it.

Moreover, it wholly disregards the mandate of Congress in Section 2 that the preference in reinstatement shall be given in the *unclassified* civil service as well as in the classified civil service, and thus achieves a rule out of harmony with the statute which has the effect of nullity. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 143.

Counsel for the Secretary insist that:

> "The later sections of the Act define the substance of 'preference' with respect to appointment, retention, reinstatement, and reemployment" (No. 473, Secy. Br. 14).

In the same breath counsel concede:

> "There is no basis in the statute for substituting the preferences created in the one employment area for those established in the other." (No. 473, Secy. Br. 23).

We quite agree that there is no tenable basis for substituting the preference created in reemployment for the preference created in reinstatement, and no tenable basis for substituting the purely competitive and classified procedure of "recertification and reappointment" for the intrinsically different preference created in reinstatement "in the position from which he [the veteran] has been removed".

This view is indicated and confirmed by the action of Congress throughout the several sections of the statute. When Congress further defined rights with respect to the preferences in reinstatement, retention, and appointment in Section 5, it did so explicitly, using the Section 2 terms *reinstatement*, *retention*, and *appointment* to indicate its intention further to define each of these specific preferences. When Congress in Section 12 further dealt with and imposed the condition of a "good" efficiency rating upon the previously absolute preference in retention created under Section 2, Congress did so explicitly, using

the unmistakable term "shall be retained in preference", as in Section 5 with the term "retention". In like manner Congress referred definitely to "certification" throughout Sections 8, 13, 15, and 16, in further dealing with and defining in scope the specific preference in "certification for appointment" created *in limine* in Section 2. The same is true with respect to the specific preference in appointment created and prescribed by Section 2 and further dealt with in like manner in Sections 5, 7, 8, 13, 15, and 16.

In addition to the elementary considerations involved and previously discussed, the provisions of Sections 15, 8, and 7 of themselves necessitate the conclusion that they are unavailable, inapplicable, and irrelevant with respect to the situation and the Attorney position involved in the instant case. If a given construction were intended—i. e. that veterans' rights to the specific preference in reinstatement, designated, created, prescribed, and defined under Section 2, are intended to be further defined, limited, or eliminated for all practical purposes under Section 15—it would have been easy for the Congress to have expressed such intention in apt terms. *United States* v. *First National Bank of Detroit*, 234 U. S. 245, 246. Remedial rights and processes may not be disposed of by conjecture. *Thompson* v. *United States*, 280 U. S. 420, 442; *Spokane & Island R. Co.* v. *United States*, 241 U. S. 344, 350; *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 311-312.

2. Section 14 is inapplicable and unavailable to these veterans of limited tenure.

Section 14 of the 1944 Act is expressly made applicable only to preference eligibles of "*permanent or indefinite*" tenure of employment, while the Secretary insists that these veterans have no such tenure but were accorded only tenure limited to the duration of the war and six months thereafter, and so cannot be considered "employees who have met all requirements for indefinite retention in their present position." § 20.3, 12 F. R. 2850, Regulation for

reduction in force. Section 14 of the Act of 1944, with the administrative remedy of appeal to the Civil Service Commission thereunder, which these veterans mistakenly pursued and exhausted (R. 55), was plainly inapplicable with respect to the agency action complained of herein. The express terms of Section 14 make it applicable only in cases of employer agency action involving dismissals, etc., *for cause*, i. e. delinquency, inefficiency, or misconduct on the part of the individual employee so dismissed. *For cause* means some dereliction or general neglect of duty, or some delinquency affecting the general character of the officer, or his fitness for holding the office, or his incapacity to discharge the duties thereof. *McKenna* v. *White*, 287 Mass. 485, 192 N. E. 84, 85, 86; *Roth* v. *State*, 158 Ind. 242, 254, 63 N. E. 460, 464, 466; *State ex rel. Eckles* v. *Kansas City*, — Mo. App. —, 257 S. W. 197, 200-201; *State ex rel. Hart* v. *Duluth*, 53 Minn. 238, 55 N. W. 118, 119-120; cf. *United States* v. *Wickersham*, 201 U. S. 390, 394-396.

Section 14 of the 1944 Act was thus inapplicable both to these veterans of limited war-service tenure and to the instant case of releases purely in reduction in force, involving no such delinquency, efficiency, or misconduct.

3. The regulations for reductions-in-force under Section 12 are inapplicable and irrelevant in Tr. 473.

The Court of Appeals expressly held that such regulations for reductions-in-force under Section 12 were not violated (R. 91-92) and held that only the rights to preference in reinstatement under Section 2 were violated (R. 93-95). Such regulations are thus no part of the basis for the judgment of the Court of Appeals attacked by the Secretary in No. 473. The regulations for reductions-in-force under Section 12 are clearly and admittedly inapplicable and irrelevant to the issues in No. 473. (No. 473, Secy. Br. 23; Veterans' "Brief for the Petitioners", 41-42).

Repetition of argument at pp. 41-45 of our preceding Brief would be an imposition.

4. Presenting no further question, the writ of certiorari in No. 473 should be dismissed.

The Secretary's Petition for a writ of certiorari in No. 473 presents the sole question whether Section 15, rather than the regulations for reductions-in-force under Section 12, governs the "reemployment rights of veterans properly separated from their positions in federal service" (No. 473, Secy. Petition, p. 2). Since each of these alternatives is unavailable, inapplicable, and irrelevant to the issues in No. 473, the aforesaid sole question presented by the Secretary is irrelevant and moot.

Counsel for the Secretary were well aware that under Rule 38(2) of this Court:

> "... Only the questions specifically brought forward by the petition for the writ of certiorari will be considered. ..."

Nevertheless, in their instant Brief for the Secretary in No. 473, counsel proceed to argue at length further questions concerning the veterans' rights to preference under Section 2. But only rights under Section 15 and under the regulations for reductions-in-force under Section 12 were brought forward by the Secretary's Petition for a writ of certiorari in No. 473. Counsel for the Secretary are not entitled, in defiance of the Rules of this Court, to conduct a fishing excursion into every other question which now or later occurs to them, and to argue from a blank sheet any or all of such questions.

Since the sole question in No. 473 fails and no other question was brought forward by the Secretary's Petition for a writ of certiorari, the writ of certiorari in No. 473 should be dismissed.

II.

The Veterans' Right to Preference in Retention Was Violated and Wrongfully Denied Since June 6, 1947. (No. 474)

1. The veterans' retention preference under the 1912 provision was not and is not restricted to those having classified civil service status.

In their present Brief in No. 474 counsel persist in urging the same view which was adopted by the Court of Appeals when it held that:

> "Elder's [petitioners'] preference does not arise from the proviso of § 4 of the Act of 1912 because the application of that section is confined by its terms to those having classified civil service status." (R. 91).

The court thus adopted the argument then made that:

> "Section 4, to which the [1912] proviso was attached, concerned *civil service tenure* in the District of Columbia. The proviso obviously partakes of that purpose and is limited by the context to employees with such *civil service status.*"

No provision concerning *civil service tenure* or *civil service status appears* in Section 4 or in any part of the Act of 1912.

There was an unsuccessful effort to insert a provision concerning *civil service tenure or status* in a rider abortively designated as "Section 5" which finally failed of passage. Such "Section 5" provided that *civil service tenure* be limited to five years. Both § 4 and "Section 5" were introduced as riders to the Legislative, Executive, and Judicial Appropriation Act for the fiscal year 1913, and to each section was later appended on the floor the same veterans' preference proviso as a rider appended to a rider. During the subsequent legislative proceedings this unhatched "Section 5", both with and without the veterans'

proviso appended thereto, was repeatedly repudiated and was finally dropped altogether. Meanwhile § 4, with the same veterans' proviso appended, was in due course included in the omnibus Appropriation measure as finally enacted August 23, 1912 (37 Stat. 360, 413). A consecutive statement of the proceedings follows herewith.

The "1912 proviso" was a rider appended to a rider inserted in the Annual Legislative, Executive, and Judicial Appropriation Act for the fiscal year 1913, finally enacted August 23, 1912. The House Committee on Appropriations recommended "Section 5" of the bill (H. R. 24023) which provided for limitation of civil service tenure to five years, without any veterans' preference proviso. H. Rept. No. 633, 62d Cong., 2d Sess., p. 14. A veterans' preference proviso was added on the floor of the House. 48 Cong. Rec., p. 6191. The Senate Committee on Appropriation struck out "Section 5", including the appended proviso, and inserted a new Section 4 establishing a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia, also without any veterans' preference proviso. S. Rept. No. 832, 62d Cong., 2d Sess., p. 7. The Conference Agreement thereafter included both § 4 (as above) and "Section 5" (limiting civil service tenure to 7 years), with an identical veterans' preference proviso attached to each of the two Sections. H. Doc. 910, 62d Cong., 2d Sess., pp. 66-67. In this form the measure was vetoed *in toto* by the President, because of his objection to "Section 5" and to still another rider abolishing the Commerce Court. Id., pp. 1-4. The measure, as finally passed by both House and Senate and approved by the President, dropped "Section 5" entirely, but included § 4 with the veterans' preference proviso appended thereto. The entire Section 4, as finally enacted, reads as now incorporated in the Statutes at Large, 37 Stat. 360, 413.

The entire legislative proceedings, *supra*, serve as an illustration of the futility and unsoundness of "constructing" a Congressional "intention" upon such fortuitous

maneuvers. *Ex parte Collett,* 337 U. S. 55, 61. In this instance, the circumstances warrant no more than an inference of the utter *indifference* of Congress to the context into which an *independent and substantive provision* is engrafted as a parasitic rider with the single intention of getting it passed and on the books as law.

The opinion in *Chesapeake & Potomac Tel. Co.* v. *Manning,* 186 U. S. 238, 242, 246, describes similar set of legislative maneuvers. See, also, some of the other cases in which such a proviso has been interpreted as an independent and substantive provision separate and distinct from the context of the section in which it is found, and as intended to apply generally to all cases within the meaning of the language used. *United States* v. *Babbit,* 66 U. S. 55, 61; *Springer* v. *Government of the Philippine Islands,* 277 U. S. 189, 207; *McDonald* v. *United States,* 279 U. S. 12, 20-21; *Georgia Banking & Railroad Co.* v. *Smith,* 128 U. S. 174, 181; *American Express Co.* v. *United States,* 212 U. S. 522, 534; *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 36, 37.

It is not without significance that neither the *1876* proviso—which granted an absolute retention preference to veterans "equally qualified"—nor the Section 3 in which it is found, nor the omnibus Appropriation Act of 1877 of which it forms a part, contains any mention of the classified civil service or of classified (permanent) tenure of employment or any language even remotely suggesting that the veterans' preference given under Section 3 had any connection whatever with the classified civil service or to veterans having classified (permanent) tenure of employment. There has, in fact, been a total lack of rational connection between veterans' preference and tenure of employment throughout the entire legislative history of the 1876 and 1912 provisos.

The 1876 proviso has been construed by this Court together with the 1912 proviso *in pari materia* with the 1944 Act as forming one act and as embodied in the 1944 Act. *Hilton* v. *Sullivan,* 334 U. S. 323, 335-339.

The well-established rule requires that the later of such acts *in pari materia*—the 1944 Act—be regarded as a legislative recognition and declaration of the true construction of the prior law of 1912 and as intended to remove any doubt previously existing as to the meaning of such prior law. *Weedin* v. *Chin Bow*, 274 U. S. 657, 668; *Johnson* v. *Southern Pac. R. Co.*, 196 U. S. 1, 21; *Wetmore* v. *Markoe*, 196 U. S. 28, 76-77; *Cope* v. *Cope*, 137 U. S. 682, 688; *Bailey* v. *Clark*, 21 Wall. 284, 288; *United States* v. *Freeman*, 3 How. 556, 564-565; *Alexander* v. *Alexandria*, 5 Cranch, 1, 7.

When Congress, in the forthright language of Section 2 of the Act of 1944, declared and commanded that preference in retention shall be given in the *unclassified* civil service as well as in the classified civil service the question was settled plainly, completely, and finally.

It comes simply to this:

(a) Section 4, to which the 1912 proviso was attached, did *not* concern *civil service tenure*. So the 1912 proviso could *not* "partake of that purpose and be limited by the context of the section to employees with such *civil service status*."

(b) Section 4 of the 1912 Act did establish a system of efficiency ratings for the classified service. *Quære*, whether the 1912 proviso partakes of that purpose or is limited by the context of the section to employees in the *classified service*?

(c) Congress, in Section 2 of the Act of 1944, declares and commands that preference in retention shall be given in (a) the classified civil service; (b) the *unclassified* civil service: this is conclusive legislative recognition and declaration that the preference in retention under the prior law of 1912 *is not* and *was not* limited to the classified service, but extends to the *unclassified* civil service as well. *Weedin* v. *Chin Bow*, and other cases above cited.

Nowhere in his Brief in No. 474 does the Secretary face down the obvious and unmistakable intention of Congress when it placed this provision at the forefront of the Act

of 1944. In his Brief in No. 473 he concedes that Section 2 does "declare a general policy of preference" (Br., 13). It is respectfully submitted that the foregoing is an essential part of the policy and purpose of Congress.

2. The rights of these veterans under the 1912 provision are preserved by § 18 of the 1944 Act.

Counsel argue that the 1912 proviso "has no standing as independent legislation for it was superseded by the 1944 Act." Counsel cite H. Rept. No. 1289, 78th Cong., 2d Sess., p. 7, where such a statement was made, presumably with the normal import of "displace, supplant, repeal."

As stated by the Senate Committee on Civil Service, Section 18 of the Act of 1944 "contains a saving clause for the protection of existing rights under present laws, Executive orders, rules and regulations." S. Rept. No. 907, 78th Cong., 2d Sess., p. 4. Section 18 reads:

> "Sec. 18. All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, and this chapter shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof."

The protection of this saving clause applies with precision to each of these petitioner veterans. Each received an honorable discharge from the United States Army—Elder on December 9, 1918; Furman on May 5, 1942—and since these respective dates each has been an honorably discharged soldier as well as an ex-serviceman who served on active duty in the Infantry branch of the armed forces of the United States during World War I and World War II respectively, and each was separated therefrom under honorable conditions (R. 3, 77, 50). From August 1, 1943, to June 6, 1947—almost four years—each of them was employed in a civilian position in the United States Depart-

ment of Agriculture at Washington, D. C., with departmental efficiency ratings of "good" or better. (R. 50, 3, 77).

These undisputed allegations, without more, establish: (1) that each of the petitioner veterans has been a veterans' preference eligible and preference employee since a definite date long prior to the enactment on June 27, 1944, of the Veterans' Preference Act of 1944; (2) that the long standing absolute retention preference rights given by the 1912 provision and embodied in the 1944 Act, *Hilton* v. *Sullivan*, 334 U. S. 323, 336-339, were granted to and have been possessed by these petitioners since 1918 and 1942 respectively and since June 27, 1944, have been protected and preserved for each of them under the saving clause in Section 18 of the Act of 1944. *Mitchell* v. *Cohen*, 333 U. S. 411, 423.

In *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 162, the Court said:

> "The usual function of a saving clause is to preserve something from immediate interference—not to create ambiguity; and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it."

In *United States* v. *Shreveport Grain and Elevator Co.*, 287 U. S. 77, 83, the Court said:

> "In proper cases such reports [of committees of the Congress] are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms (cit. cases). Like other extrinsic aids to construction, their use is 'to *solve*, but not to *create* an ambiguity' (cit. cases). Or as stated in *United States* v. *Hartwell*, 6 Wall. 385, 386, 'If the language is clear it is conclusive. There can be no construction when there is nothing to construe'."

There is nothing ambiguous about the saving clause in Section 18. But even it has had "legislative history" dragged out for dissection in this case.

The committee reports stated simply that the saving clause in Section 18 protects existing statutory rights of "peacetime veterans." H. Rept. No. 1289, 78th Cong., 2d Sess., p. 3; S. Rept. No. 907, 78th Cong., 2d Sess., p. 2. So it was argued below that this saving clause "was intended *merely* to protect the preference of *peace*-time veterans", and accordingly that all but *peace*-time veterans are excluded from such preference, protection, and benefit. Of course, this construction that the 1912 provision was preserved with open arms for *peace*-time veterans but denied to *war*-time veterans, was cut from the same cloth as the construction that the 1912 provision was "superseded." It is obvious that both could not be true. Each of these pseudo-constructions is peculiarly repugnant to the entire spirit, intent, and policy of the Congress "since the beginning of the Republic to extend certain [not uncertain and illusory] benefits to those who have risked their lives in the armed forces during wartime." H. Rept. No. 1289, 78th Cong., 2d Sess., p. 2; 30 Cong. Record, p. 3502, 78th Cong., March 27, 1944.

Either of such constructions would be manifestly incompatible with the determination of this Court in *Hilton* v. *Sullivan*, 334 U. S. 323, 337-339: that the purpose of Congress in passing the Act of 1944 was not to take away but to strengthen and broaden—precisely the opposite from narrow—the veterans' preferences then embodied in statutes and executive orders, and that any interpretation or holding is prohibited which would mean that passage of the Veterans' Preference Act of 1944 narrowed the existing scope of veterans' preferences in case of reduction in force of government personnel.

Counsel for the Secretary argue that:

> "Respondents [veterans] apparently claim (Resp. Br., p. 31) that this savings-clause preserves the 1912 statute, as they construe it, as a separate and indepen-

dent source of retention benefits." (No. 474, Secy. Br., 16)

Lest the Court be misled, we quote from the page 31 of our Brief cited by counsel:

> "Pursuant to Section 18 of the Act of 1944 and the above determination of this Court, the Secretary of Agriculture was subject under the second proviso of Section 12 of the Act of 1944 to ~~be~~ *embodied import and effect of the absolute 1912 command* not to discharge, drop, or reduce in rank or salary any such veteran government employees as these petitioners." (No. 473-474, Veterans' Br. 21) [Emphasis supplied]

It is respectfully submitted that both the 1912 provision and its embodied rights, import, and effect in the Act of 1944 have been administered by the Civil Service Commission under an unfounded and erroneous administrative construction expressed in regulations which fail to carry into effect the will of Congress as expressed in the Act of 1944 with its embodiment and broadening of the rights, import, and effect of these earlier acts in *pari materia*. The regulations thus operate to create a rule out of harmony with the statutes and are an unauthorized nullity. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 129, 143; *Morrill* v. *Jones*, 106 U. S. 466, 467; *Miller* v. *United States*, 294 U. S. 435, 440; *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610; *Helvering* v. *Hallock*, 309 U. S. 106, 119-121; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489; *United States* v. *George*, 228 U. S. 14, 21; *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 514; *Borg* v. *Campbell Art. Co.*, 214 U. S. 236, 248; *Helvering* v. *Powers*, 293 U. S. 214, 224; *Lynch* v. *Tilden Produce Co.*, 265 U. S. 315, 320-321; *Utah Light & Power Co.* v. *United States*, 243 U. S. 389, 410.

The facts that the regulations had stood for some time, that the statute had been reenacted, and that former decisions had to be overturned, were held by this Court not to excuse the court from applying the law correctly and from

overturning the previously incorrect decisions. *Helvering* v. *Hallock*, 309 U. S. 106, 119-121, *supra*.

Neither the court nor the commission is warranted in departing from the prescribed statutory standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489, *supra*.

Where statutory rights, as here, have been denied by agency action, the decision of the Civil Service Commission, denying the appeals of these veterans and approving the Secretary's agency action in denial and violation of such rights, is clearly subject to revision by the Court.

The agency action of the Secretary, the administrative construction embodied in the regulations, and the administrative decision of the Civil Service Commission approving such action, alike turned on a pure question of law, in respect of which the Secretary and the Commission misconstrued the law. The administrative determination of that question is subject to judicial review in the present suits. *Dismuke* v. *United States*, 297 U. S. 167, 171; *Tagg Bros.* v. *United States*, 280 U. S. 420, 442; *Securities & Exchange Commission* v. *Chenery*, 318 U. S. 80, 94-95; *Virginian R. Co.* v. *System Federation*, 300 U. S. 515, 562; *United States* v. *Laughlin*, 249 U. S. 440, 443; *Medbury* v. *United States*, 173 U. S. 492, 497-498; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 276; *Interstate Commerce Commission* v. *Union Pac. R. Co.*, 222 U. S. 541, 547, 548.

Such administrative decisions or rulings cannot enlarge or diminish the meaning of statutes enacted by Congress, nor add to or subtract from the terms of an act of Congress, nor confer legality upon agency action which is in direct violation of the statutory legal rights of these petitioners to the long standing absolute retention preference of veterans given by the 1876 and 1912 Acts and broadened, strengthened, and embodied in the 1944 Act. The power of the Civil Service Commission will not, in the absence of a plain command, be deemed to extend to the denial of a

right which the statutes create and to which the petitioners, upon facts found or admitted by these administrative officers, are entitled. (Cases cited *supra*)

Such review is now prescribed by express provisions of Section 10 of the Administrative Procedure Act of June 11, 1946. §10, 60 Stat. 243, 5 U. S. C. § 1009. Cf. *Snyder* v. *Buck*, 75 F. Supp. 902, 907-908 (D. C., D. C., 1948); *Ma-King Products Co.* v. *Blair*, 271 U. S. 479, 483; *Pope* v. *United States*, 323 U. S. 1, 14.

These suits for violation of the legal rights of the petitioner veterans under the applicable statutes may be maintained against the Secretary of Agriculture without joining the Civil Service Commission which promulgated the regulations pursuant to which the Secretary assumed to act. *Williams* v. *Fanning*, 332 U. S. 490, 493-494; *Colorado* v. *Toll*, 268 U. S. 228, 230. Adequate relief may be afforded by "an adaptation of court procedure to a remolding of the situation as nearly as may be to what it should have been initially." *Addison* v. *Holly Hill Fruit Products Co.*, 322 U. S. 607, 620; *Jones* v. *Securities & Exchange Commission*, 298 U. S. 298 U. S. 1, 17.

CONCLUSION.

For the reasons stated in our foregoing briefs in No. 473 and No. 474:

The judgment of the Court of Appeals should be affirmed insofar as it reverses the judgments of the District Court.

Insofar as it fails to afford appropriate relief to petitioners in No. 474, the judgment of the Court of Appeals should be reversed and the causes remanded with direction for such relief as this Court may deem just and proper.

Respectfully submitted,

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